

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-2151

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES KAYLOR,

Petitioner-Appellant.

-against-

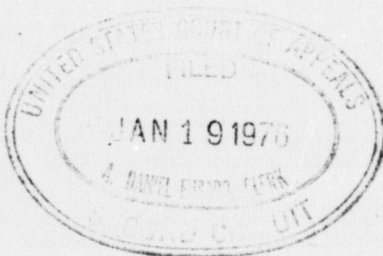
UNITED STATES OF AMERICA,

Respondent-Appellee.

Docket No. 75-2151

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR PETITIONER-APPELLANT

QUESTION PRESENTED

Whether Wolverton's courtroom confrontation with appellant was so unnecessarily suggestive and conducive to irreparable mistaken identification that appellant was denied due process of law.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from an order of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) rendered on November 26, 1975, after a hearing, denying appellant's application pursuant to 28 U.S.C. §2255 for vacature of his sentence.*

The Legal Aid Society, Federal Defender Services Unit was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Evidence Produced at Trial**

On July 20, 1972, at approximately 11:00 p.m., Carl Wolverton, a truck driver, arrived in Jamaica, New York, from Dakota City, Nebraska, with a trailerload shipment of beef. He parked the tractor-trailer and went for a sandwich (T180).*** Upon Wolverton's return to the cab of the truck, an individual, later identified by Wolverton

* Judge Neaher's opinion, denying appellant's application, is "B" to appellant's separate appendix.

** A summary of the evidence of the crime may be found in this Court's opinion, United States v. Kaylor, 491 F.2d 1127, 1129 (2d Cir. 1973), reproduced as "C" to appellant's separate appendix.

*** Numerals in parenthesis preceded by a T refer to pages of the trial transcript. Numerals in parenthesis preceded by an H refer to pages of the transcript of the hearing held pursuant to 28 U.S.C. §2255.

as appellant's co-defendant, Willie Glen Hopkins, opened the door, pointed a gun, and told Wolverton to get into the bunk behind the driver's seat and lie on his stomach (T182, T303). Wolverton complied, and Hopkins then sat on Wolverton, placed a gun in Wolverton's ear and told him not to move (T183, T305). Two minutes after Hopkins had opened the truck door (T306), a second person entered the cab of the truck (T183, T308). This second person then held the gun on Wolverton while Hopkins bound Wolverton and placed tape over his eyes and mouth (T183-184).

Wolverton, who testified that his opportunity to observe this second person was limited to at most one and one-half minutes (T200, T310), conceded that he was "scared to death" during this time (T202). After Wolverton was bound, the second person to enter the truck drove the vehicle for several hours (T334, T337) before Wolverton was transferred from the cab of his truck to a Dodge van (T194, T344-345). Wolverton was abandoned in the van and was able to free himself at approximately 10:00 a.m. on July 21, 1972 (T351). Hopkins' fingerprints were found in the van (T562-63).

At 7:00 a.m. on July 21, John Flynn, a New York City detective, saw Wolverton's tractor-trailer and followed it (T277-228). Flynn saw the truck being parked and observed the driver and his helper, who Flynn identified as Hopkins (T232), leave the vehicle. Flynn identified himself as a police officer and, after a brief conversation with

the driver and Hopkins, followed the truck to its destination, a meat market owned by Charles Simonian and Nicholas Stolfi (T231, T234). There, Flynn observed five individuals dressed in butcher coats attempt to direct the truck into a parking space (T235). When the truck pulled out, and circled the block (T235), Flynn called for assistance. After the trailer-truck returned, Flynn saw the driver and Hopkins flee (T236). This driver, who was not appellant (T241), has not been apprehended (T233).

Simonian testified that at approximately 6:45 a.m. on July 21, in a luncheonette near the meat market, he had a conversation with an individual known to him as "Shorty," concerning the purchase of a trailerload of meat (T431). After the conversation, Simonian and "Shorty" left the luncheonette and went to the rear of Simonian's meat market, where Simonian observed the tractor-trailer approaching. Simonian rejected the offer of meat, and "Shorty" disappeared (T436-437).

B. The Identification Hearing Held During the Course of the Trial.

During Wolverton's initial appearance on the witness stand, he was not asked and did not make an identification of the defendants, testifying instead only about the chronology of the hijacking. However, after Wolverton left the stand and returned to the witness room, he told Flynn that he could now identify the defendants (T366, T287). When in-

formed of this, the Assistant United States Attorney requested that Wolverton be recalled as a witness (T206). At that point, Judge Rosling, outside the presence of the jury and over defense counsel's objection (T209), held a hearing on the possible suggestiveness of Wolverton's identification testimony. The Judge noted that had he known there was a possibility that Wolverton would testify as to identification, he would have directed that the defendants be removed from the counsel table when Wolverton first took the witness stand (T216).

At the hearing held during trial after Wolverton had the opportunity to observe petitioner at the counsel table, Wolverton stated he could pick out only one of the defendants (Hopkins) as having been a participant in the hijacking "without a doubt in [his] mind" (T216). As to whether appellant was the other person involved, however, Wolverton was unsure (T219), and requested that appellant remove his jacket, lift up his sleeve, and say "Nobody's going to hurt you, buddy." After appellant was told by the Court to comply, and did so, the following occurred:

THE COURT: Is that the voice?

THE WITNESS: Of number two.*

THE COURT: All right. He says it is number two.

(T221). Emphasis added

Further, the testimony at the hearing showed that approximately eight hours after Wolverton had escaped

* "Number Two" referred to the man who had driven the truck after Wolverton had been restrained (T221).

from the van on July 21, 1972, he was interviewed by FBI agent Armstrong (T264). At that time the Agent showed Wolverton photographs of individuals, including one of appellant (T265, T268), but Wolverton could not recognize any of the individuals photographed as a participant in the hijacking. Indeed, although Wolverton testified when the trial resumed that appellant was the second person in the cab who had pointed a gun at him and that this person's face was seared into his mind, the truck driver conceded that only hours after the hijacking he could not identify appellant's picture (T310).

In spite of his failure to identify appellant only hours after the incident and his initial uncertainty at the identification hearing, Wolverton nevertheless proceeded to testify at trial, after the completion of the hearing, that he had no doubt whatsoever that appellant was one of the two hijackers of his truck (T302). During the course of this testimony by Wolverton and after cross-examination by counsel had been completed, the District Court elicited the facts about the identification that had previously occurred at the hearing out of the jurors' presence:

THE COURT: Just a moment. Have you [Wolverton] heard the defendant James Kaylor speak since the day of the accident -- when I say accident I mean incident?

THE WITNESS: Yes, sir.

THE COURT: When did you hear him, just when?

THE WITNESS: Yesterday.

THE COURT: What did he say at somebody's direction for you to listen to? What were the words?

THE WITNESS: 'Ain't nobody goin' to hurt you, Buddy.'

THE COURT: That's what you heard him say yesterday?

THE WITNESS: Yes, sir.

THE COURT: And did you see anything yesterday that was not on the picture that you looked at?

THE WITNESS: Yes, sir.

THE COURT: (Continuing). . . of Mr. Kaylor?

THE WITNESS: Yes, sir.

THE COURT: Yesterday, right?

THE WITNESS: Yes, sir.

THE COURT: Where was he standing when you saw him?

THE WITNESS: Yesterday?

THE COURT: Yesterday.

THE WITNESS: Right here (indicating)

THE COURT: And did you request to look at certain parts of his body?

THE WITNESS: Yes, sir.

THE COURT: What parts of his body?

THE WITNESS: His arms.

THE COURT: Did you request that he do anything with any clothing that he had on?

THE WITNESS: Take off his jacket so I could see his arms.

THE COURT: Did you look at his arms?

THE WITNESS: Yes, sir.

(T369-371)

Moreover, the testimony at trial showed that on July 21, after the conversation in which he rejected the meat, Simonian, a co-owner of the meat market, was shown an album containing 100 to 150 photographs. He selected appellant's picture as only "strongly resembling 'Shorty'," and both Simonian and Stolfi, the other co-owner, were able to select only one of two pictures of appellant submitted to them prior to their grand jury appearances (T448, T471).^{*} Although the testimony concerning the pre-grand jury photo identification was introduced at trial, Simonian and Stolfi did not identify petitioner as "Shorty" at trial. On the contrary, they both asserted that appellant was not "Shorty":

MR. GILLEN: Is this Mr. Kaylor?
Is that Shorty?

SIMONIAN: No, Sir.

Q That is not Shorty?

A No. Not the Shorty I know.

Q You are sure about that, Mr. Simonian?

A Yes, Sir.

(T448)

MR. GILLEN: Now, Mr. Kaylor, will you stand, please? Would you [Stolfi] look at Mr. Kaylor, please. Is that the man you knew as Shorty?

STOLFI: No.

(T471)

The defense presented no witnesses at trial.

^{*} A total of nine pictures was presented to them.

At the jurors' request during deliberations, Wolverton's identification testimony was re-read. Additionally, at their specific request, the jurors were re-read the testimony elicited by the Court concerning the identification procedure that had occurred at the hearing held outside their presence during the trial. (T739-740a).^{*} Approximately two hours after this testimony had been read, and a half-hour after Hopkins' guilty verdict had been returned, the jury found appellant guilty of the first count of the indictment.

C. The Appeal

On appeal, appellant's counsel raised four issues which were all unrelated to any claim that the intra-trial identification procedure was improper.^{**} Hopkins, appellant's co-defendant, argued that the in-court identification of him was tainted by the fact that it had occurred after Wolverton had been recalled for that purpose and after Wolverton had an opportunity to see him at the counsel table.^{***} United States v. Kaylor, 491 F.2d 1127, 1129 (2d Cir. 1973). Appellant's counsel did not join in the

^{*} The jurors specifically referred to this testimony as the "voice identification" testimony (T739).

^{**} Appellant argued that the trial judge's conduct deprived him of a fair trial, that there was not competent evidence before the grand jury to sustain an indictment, that the trial court improperly allowed the testimony of two witnesses who could not identify appellant at trial and that the trial court erroneously admitted into evidence statements made by appellant.

^{***} Hopkins also raised issues related to his sentencing procedure. United States v. Kaylor, supra, 491 F.2d at 1129.

arguments raised by Hopkins' counsel. See Brief for Appellant Kaylor filed in United States v. Kaylor, Docket No. 73-1530 (Oct. 13, 1973).

Rejecting the claims that were raised by appellant, this Court affirmed appellant's conviction. United States v. Kaylor, supra. Further, this court held that while the procedure by which Hopkins was identified amounted to a show-up, it did not violate due process because of the totality of the circumstances, United States v. Kaylor, supra, 491 F.2d at 1131-1132.

D. Collateral Proceedings

By petition dated September 4, 1974, appellant moved, pursuant to 28 U.S.C. §2255, to vacate his sentence and judgment of conviction. Appellant argued that he was denied the effective assistance of counsel and that the identification procedures utilized during his trial were violative of due process. At the §2255 hearing held by the District Court, appellant's co-defendant, Hopkins, testified that while he participated in the hijacking, appellant did not. Further, Hopkins stated that the other individual who entered the cab of the truck with him was short, had muscular arms, and looked like appellant (H38-39, H50).

The District Court (The Honorable Edward R. Neaher) denied appellant's motion for vacature of his sentence (Appellant's Appendix B).^{*} While holding that the identification issue as to appellant was not raised on

^{*} The District Court rejected appellant's claim that he was deprived of the effective assistance of counsel.

appellant's direct appeal, the District Court, nonetheless, refused to rule on the merits of the question presented. The District Court based this decision on its view that it would be "inappropriate" to review the prior decision of Judge Rosling (appellant's trial judge) since that decision was made by a Court of coordinate jurisdiction.* Appellant's Appendix B at 10-11.

* The District Court also felt that although this Court had not explicitly considered the identification question as to appellant, the Court's decision was applicable to appellant as well as to Hopkins.

ARGUMENT

WOLVERTON'S COURTROOM CONFRONTATION WITH APPELLANT WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCTIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT APPELLANT WAS DENIED DUE PROCESS OF LAW

A. The identification procedures employed were unnecessarily suggestive and created a substantial likelihood of irreparable misidentification of appellant.

Wolverton viewed appellant seated at the counsel table during the witness' initial testimony at trial. This inherently suggestive show-up, United States v. Kaylor, *supra*, 491 F.2d at 1131; see Stovall v. Denno, 388 U.S. 293, 302 (1967); cf. Brathwaite v. Manson, Docket No. 75-2093, *slip op.* at 602 n.6 (2d Cir. Nov 20, 1975), was continued when Wolverton viewed appellant at the identification hearing held in interruption of the trial. The manner in which this hearing was conducted made it inevitable that Wolverton would identify appellant as the second man involved in the hijacking whether or not appellant had in fact participated. See Foster v. California, 394 U.S. 440, 443 (1969).

At the hearing, appellant alone was compelled to stand, display his arms and repeat the words spoken by one of the hijackers. Rather than eliminating the danger that appellant's image was fixed in Wolverton's mind by the show-up that had already occurred during trial, this later one-to-one

confrontation increased the inherent suggestiveness of the situation by preventing comparison of the salient characteristics of appellant with comparable features of other people and by further solidifying in Wolverton's mind his impression that appellant was one of the guilty parties. Moreover, Judge Rosling, instead of attempting to minimize the suggestiveness which he himself recognized had already attached, further insured that Wolverton would later identify appellant at trial by telling Wolverton that he had identified appellant as the number two man, although Wolverton had in fact only identified appellant's voice as that of the second person. In short, it is difficult to imagine an identification procedure which could have been more overtly suggestive. See Stovall v. Denno, supra, 388 U.S. at 302; Foster v. California, supra, 394 U.S. at 443; Wall, Eyewitness Identification In Criminal Cases, 27-34 (1965).*

The suggestive identification procedures employed were clearly unnecessary.** Not only could appel-

* This commentator has noted:

Together with its aggravated forms, it [a show-up] constitutes the most grossly suggestive identification procedure now or ever used by the police.

(Wall, supra, at 28)

** Indeed, this Court's decision in United States v. Kaylor, supra, 491 F.2d at 1131, held in effect, that the initial viewing of appellant and Hopkins while Wolverton was testifying was unnecessarily or impermissibly suggestive. This is clear from this Court's indication that the resolution of the identification issue as it related to Hopkins depended upon the totality of the circumstances, since these factors need only be examined if it has already been determined that the procedure employed was unnecessarily or impermissibly suggestive. United States ex rel. Pella v. Reed, Docket No. 75-2076, slip opinion, 1025, 1031-32 (2d Cir. December 11, 1975). United States ex rel. Phlips v. Follette, 428 F.2d 912, 914-15 (2d Cir.) cert. denied 400 U.S. 908 (1970).

lant have been seated away from the counsel table during the identification hearing,* but a valid out-of-court or in-court line-up could easily have been arranged.** Even if such a line-up could not be easily arranged however, requiring appellant alone to stand, display his arms and speak the words uttered by the hijacker simply cannot be justified. Stovall v. Denno, supra, 388 U.S. at 301-302. Wall, supra at 13-14.

As this court has already held in affirming Hopkins' conviction, the ultimate resolution of whether there is a substantial likelihood of irreparable misidentification, depends upon an analysis of the totality of the circumstances involved. United States v. Kaylor, supra, 491 F.2d at 1131; see also, Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Stovall v. Denno, supra, 388 U.S. at 302; United States ex rel Pella v. Reid, Docket No. 75-2076, slip opinion, 1025, 1032 (2d Cir. December 11, 1975); United States ex rel Phipps v. Follette, supra at 915.

. . . [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the

* Since Judge Rosling recognized that appellant should not have been seated at counsel table during Wolvertson's initial testimony, it is difficult to understand why this was not done for the hearing.

** This was especially important in light of Hopkins' testimony at the \$2255 hearing that appellant resembled the number two man. At this hearing, Hopkins admitted his own guilt in the hijacking and exonerated appellant.

criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation.

(Neil v. Biggers, supra,
409 U.S. at 199-200)

During the crime, before he was blindfolded and while lying on his stomach, Wolverton only viewed the man he later claimed was appellant for at most one and one-half minutes at 11:00 p.m. Moreover, Wolverton admitted that he was understandably "scared to death." Six months later at trial, even though Wolverton had observed appellant sitting at the counsel table, he was still unsure whether appellant was the number two man,* although Wolverton was sure that Hopkins, who was then sitting next to appellant, was the first hijacker ("I know I can [identify] one positively." T216).

Wolverton's certainty about Hopkins and his uncertainty about appellant after his initial trip to the witness stand is extremely significant since Wolverton had approximately the same opportunity to observe both Hopkins and the number two man during the crime. His uncertainty about appellant at this stage of the proceedings strongly suggests that Wolverton had not formed a fixed image of the second person as a result of his observations during the crime; compare United States ex rel Johns v. Casscles, 489 F.2d 20, 24 (2d Cir. 1973). This conclusion is

* Because Wolverton was unsure only about appellant, appellant alone was required to stand, display his arms and talk.

further supported by Wolverton's failure to identify a photograph of appellant on July 21, 1972, only one day after the crime,* and the extremely general description he gave to the FBI of the person he claimed was appellant** (T201).

Moreover, the long interval between the crime and the grossly suggestive identification procedures, (compare United States ex rel Rutherford v. Deegan, 406 F.2d 217, 220 (2d Cir.) cert. denied, 395 U.S. 483 (1969); United States ex rel Bisordi v. La Vallee, 461 F.2d 1020, 1024 (2d Cir. 1972); United States ex rel Pella v. Reid, supra, slip opinion at 1035) coupled with the one-day interval between the improper confrontation and Wolverton's identification testimony at trial, greatly increased the probability that Wolverton was relying on his most recent confrontation with appellant. See United States ex rel Phipps v. Follette, supra, 428 F.2d at 915.

That Wolverton's in-court identification was premised on what he observed at the trial and identification hearing is further confirmed by the fact that Wolverton's increasing certainty that appellant was the man paralleled the progressively suggestive procedures to which appellant was subjected.

* Wolverton never failed to identify Hopkins.

** Wolverton described one hijacker as short and stocky with "tremendous built arms" and the other as completely the reverse "quite skinnier and somewhat taller" (T201-202).

After Wolverton saw appellant sitting at counsel table during the trial, he was unsure that appellant was one of the hijackers (T219). Even after focusing on appellant's face and seeing appellant's arms at the suggestive identification hearing, Wolverton testified only that he recognized appellant's voice (T221). The next day at trial and after Wolverton had been assured by the Court that he had identified appellant as the number two man, Wolverton testified that he now had no doubt whatsoever that appellant was one of the hijackers (T302).

Thus, in light of the totality of the circumstances, there was a substantial likelihood of irreparable misidentification at trial, and Wolverton's trial identification of appellant based on the improper procedures violated due process. See Stovall v. Denno, 388 U.S. 233, 302 (1967); Simmons v. United States, 390 U.S. 377, 384 (1968); Foster v. California, *supra*, 39 U.S. at 443; Neil v. Biggers, *supra*, 409 U.S. 199-200; United States ex rel Pella v. Reid, Docket No. 75-2076, *slip op.* 1025, 1031-32 (2d Cir. December 11, 1975). See also, United States ex rel Phipps v. Follette, *supra*; Brathwaite v. Manson, Docket No. 75-2093, *slip op.* 595, 610 (2d Cir. November 20, 1975).

B. The admission into evidence of testimony about the impermissible identification that had occurred at the hearing during trial was improper.

Rather than attempting to limit the prejudice suffered by appellant as a result of the improper identification procedures employed, Judge Rosling, at trial, exacerbated the situation. After Wolverton was cross-examined by both defense counsel for appellant and Hopkins, Judge Rosling, in the jurors' presence, questioned Wolverton about the identification hearing that had been held the previous day and about the identification that had occurred there as a result of the impermissibly suggestive and unnecessary procedures employed. This was per se error and appellant's conviction, having been secured as a result of this testimony, cannot stand. Brathwaite v. Manson, supra, slip opinion at 601-602, 610. See also, United States v. Fernandez, 456 F.2d 638, 641-42 (2d Cir. 1972).

Moreover, the Court's error in causing the improper and suggestive identification procedure to be presented to the jury was not harmless. See generally, Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969). Having been instructed that the only question in the case was the identity of the hijackers (T714), the jurors specifically requested that the improper "voice identification" testimony be re-read (T739). Judge Rosling complied with this request (T740-740a). Furthermore, in summation the Assistant United States Attorney relied both on Wolverton's testimony about the identification that had

occurred and Wolverton's description of the procedure utilized, to bolster the Government's argument that appellant was the second person involved in the hijacking (T691-694).

As the District Court below held, appellant's claim that the improper identification procedures employed resulted in a violation of due process was not raised by appellant in his direct appeal to this Court. Appellant's Appendix B at 11. However, because appellant's claim is a constitutional one, it may be asserted in this §2255 application. United States v. Sobell, 314 F.2d 314, 322-23 (2d Cir.), cert. denied, 374 U.S. 857 (1963); United States v. Coke, 404 F.2d 836, 847 (2d Cir. 1968) (en banc); Davis v. United States, 417 U.S. 333, 345 n. 15 (1974). Cf. Kaufman v. United States, 394 U.S. 217, 223 (1969). See also Kapatos v. United States, 432 F.2d 110, 113 (2d Cir. 1970).

Although Hopkins did raise on appeal the issue of the propriety of Wolverton's in-court identification of him, the suggestive procedures that impermissibly tainted Wolverton's identification of appellant differ crucially from those that affected the identification of appellant's co-defendant. The show-up to which Hopkins was exposed by being seated at counsel table was much less suggestive than the cumulative show-ups which involved appellant. Only appellant was compelled to stand, expose his arms and speak the words of the hijacker. Judge Posling assured Wolverton

only that he had identified appellant, and the testimony about the improper identification that had occurred, related to appellant, not Hopkins.

Moreover, certain of the circumstances involved here show that while Wolverton's identification of Hopkins was based on what Wolverton saw during the crime, his identification of appellant was not. While Wolverton was sure of Hopkins, he was unsure of appellant, in spite of the fact that he previously testified that he had the same opportunity to view both during the crime and could identify both defendants. Also, Wolverton did not affirmatively fail to identify Hopkins after the crime, as he had appellant.

Furthermore, while the evidence against Hopkins was strong, even absent his identification by Wolverton, the proof of appellant's guilt was weak.* Hopkins' fingerprints were found in the van in which Wolverton had been abandoned. Moreover, Officer Flynn identified Hopkins as one of the hijackers. On the other hand, the only evidence linking appellant to the crime was two statements made five months after the incident, which at most suggested that appellant had acquired some information about the incident.**

* This Court has previously held that it may properly consider other evidence in the case in determining a claim of misidentification. United States v. Reid, 517 F.2d 953, 967 (2d Cir. 1975); United States ex rel Gonzalez v. Vincent, 477 F.2d 79, 803-04 (2d Cir. 1973), cert. denied, 414 U.S. 924 (1974).

** The two statements were:

I know about those two guys in the meat market and they should never have paid the police the \$500.

and, . . .

If I get uptight enough about this case, I can tell you about it.

These statements become almost meaningless when it is considered that appellant was Hopkins' uncle (TS07) and that appellant could have learned about the crime from him.

Accordingly, this Court's adverse determination of the Hopkins' due process claim should not preclude consideration of the validity of the identification procedures relevant to appellant, and appellant's sentence and conviction should be vacated.

CONCLUSION

FOR THE FOREGOING REASONS, APPELLANT'S MOTION TO VACATE HIS JUDGMENT OF CONVICTION AND SENTENCE SHOULD BE GRANTED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 16, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Nathan Silbermann